



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: H. M. Kern Corporation

File: B-239821

Date: June 22, 1990

William C. Connor, Esq., Tuggle Duggins Meschan & Elrod, P.A., for the protester.
Karl Dix, Jr., Esq., and Lisa Pender Morse, Esq., Smith, Currie & Hancock, for Frontier Contracting Company, Inc., an interested party.
Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid was properly rejected as nonresponsive where bid modification imposed conditions which modified the requirements of the solicitation and limited protester's liability to the government under the contract.
2. A bidder may not be afforded an opportunity after bid opening to explain or clarify its bid so as to make it responsive, since the bidder's intention must be determined from the bid and material available at bid opening.

DECISION

H. M. Kern Corporation protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. GS-04P-90-EX-C0052, issued by the General Services Administration (GSA) for renovations to the United States Federal Building/Post Office/Courthouse, in Greensboro, North Carolina.

We dismiss the protest without obtaining an agency report from GSA, since it is clear that the protest is without legal merit. See Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1990).

GSA issued the IFB on April 2, 1990. Before bid opening on May 2, Kern sent a mailgram modifying the price of its previously submitted bid. Included in the mailgram were two notations under the heading "qualifications" as follows:

048816/141661

"1. Armor protection board based on BRF-3 (7/16" nominal thickness Class III) by Creative Industries.

"2. Backflow preventor [sic] may be required but is not included in our bid."

Because Kern qualified its bid with the "backflow preventer" notation, GSA determined that the bid was nonresponsive as it imposed a limitation on Kern's future liability to the government. See Federal Acquisition Regulation (FAR) § 14.404-2(d).

Kern argues that the notation in the mailgram was not intended to indicate that the backflow preventer would be required for successful completion of this project; rather, it only intended to inform GSA that the City of Greensboro had required installation of backflow preventers as part of similar renovation projects. Kern concludes that the notation did not impose a condition modifying the requirements of the IFB, and therefore did not limit its liability to the government.

We find that Kern's bid was properly rejected as nonresponsive because it took exception to a material requirement of the IFB. To be responsive, a bid must comply in all material respects with the IFB. See FAR § 14.301(a); Giant Lift Equip. Mfg. Co., Inc., 63 Comp. Gen. 375 (1984), 84-1 CPD ¶ 542. Further, a bidder's intention to be bound by the solicitation requirements must be determined from the bid itself at the time of bid opening. Gelco Payment Sys., Inc., B-234957, July 10, 1989, 89-2 CPD ¶ 27. The contracting agency is required to reject a bid which attempts to impose conditions that modify the requirements of the IFB or limit the bidder's liability to the government. FAR § 14.404-2(d).

Here, the IFB required performance in accordance with the standard "Permits and Responsibilities" clause, FAR § 52.236-7, which requires the contractor, without additional expense to the government, to obtain any necessary permits and to comply with any applicable municipal laws, codes, and regulations. Bidders thus were obligated under the IFB to meet any requirement by the City of Greensboro for backflow preventers. As the "backflow preventer" notation on Kern's bid modification took exception to the obligation imposed by FAR § 52.236-7 to perform in accordance with municipal ordinances, Kern's bid did not represent an unequivocal agreement to the material terms of the IFB. Thus, GSA correctly determined that Kern's bid was nonresponsive.

Although GSA properly found Kern's bid nonresponsive based only on the backflow preventer qualification, we note that Kern made an additional qualification to its bid, citing a different size armor protection boards than required in the IFB. Although Kern states that boards in the size called for by the IFB is unavailable on the market, this is a matter which Kern should have raised with the agency prior to bid opening. By indicating in its bid modification that it would not furnish board of the required size, Kern took exception to a material term of the IFB, and rendered its bid nonresponsive on this ground as well.

Kern now claims it intended to perform according to the solicitation. However, this intention was not clear from the bid documents, and Kern cannot make its bid responsive by clarifying the notations to the bid modification after bid opening. Gelco Payment Sys., Inc., B-234957, supra.

The protest is dismissed.

John F. Mitchell
for Robert M. Strong
Associate General Counsel